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Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD J. OULTON
and
AVA L. OULTON,

Petitioners,

v.

THE WYNDHAM FOUNDATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a party may appeal in the United States Supreme Court an issue not litigated at trial nor on appeal at the state level?

II. Whether the First Amendment applies to this case?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named petitioners are identified in the petition for writ of certiorari.

The Respondent is a non-profit, non-stock corporation organized pursuant to the Virginia Non-Stock Corporation Act, 13.1 Va. Code. Ann. §§ 801-980, and thus there are no publicly held or parent corporations owning any stock in the corporation.

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STATEMENT OF THE CASE

The Petitioners, Richard J. and Ava L. Oulton (hereafter, "Oultons"), neglected several significant points in their rendition of this case's history. The First Amendment was cited in their initial response to the Bill of Complaint of the Respondent, The Wyndham Foundation, Inc. ("Wyndham"), but thereafter played no part in the case or the trial until closing argument, when the Oultons offered to submit a brief on the subject. It was not raised on the appeal to the Supreme Court of Virginia until after the appeal was denied, and then only in the Petition for Rehearing. Finally, the Oultons did not raise any issue related to "ambiguity" in the underlying covenants on the land in their appeal to the Supreme Court of Virginia.

SUMMARY OF THE ARGUMENT

This Court should deny the request for a writ of certiorari because the Oultons' Petition is based on matters that have not been litigated in the trial court or raised on appeal in the Supreme Court of Virginia. No error can be assigned to a lower court for an issue with which it has not been confronted.

Regardless of whether the Oultons have brought these issues to the attention of this Court in the appropriate manner, the First Amendment does not apply to Wyndham, a private homeowners' association.

REASONS FOR DENYING THE WRIT

I. The Oultons' claims of violation of First Amendment rights and ambiguity of restrictive covenants are not presented properly to this Court for review.

The Oultons did not maintain their First Amendment claim throughout the proceedings, contrary to their contention in the Petition. The First Amendment was not raised during the trial until closing arguments, and even then it occurred after Wyndham's rebuttal argument.

In her closing, the Oultons' counsel said of Wyndham, "They are not a form of government." (Trial Trans. at 325.) In rebuttal, Wyndham's counsel stated that this eliminated any consideration of the First Amendment, which had been pled in the original responsive pleading but of which nothing further had been heard. Following this rebuttal, the Oultons' counsel offered to submit a brief on the subject of the First Amendment and its relation to this case.

The Oultons raised nine (9) issues in their appeal to the Supreme Court of Virginia, not a one of which involved the First Amendment. They later filed a Motion for Leave to Amend Petition for Appeal with the intention of including an argument on this issue. The motion was denied. After the denial of their appeal they filed a Petition for Rehearing that included an argument alleging a violation of First Amendment rights.

Most telling, however, is the Oultons' inability to point this Court to any portion of the record on this subject. Rule 14.1(g)(i) of this Court requires a Petition for Writ of Certiorari to specify:

> the stage in the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised . . . with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 14.1(g)(i).

The Oultons' Petition plainly fails to comply with this Rule, in effect confessing the inability to present a federal question for review by this Court. This cannot come as a surprise, since Richard Oulton admitted to the trial judge that he had suffered no such transgression. In a telling colloquy between the judge and Mr. Oulton during his testimony (and addressing the alleged hindrance Wyndham had placed upon his display of any flags) the following exchange occurred:

> THE COURT: And they never told you you could not put the flag up.
>
> THE WITNESS: No. You're right, sir.

(Trial Trans. at 202.)

This Court has taken a dim view of appellate claims which surface for the first time on appeal. "In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below," *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, (1992). In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, (1997), this Court further explained that:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, . . . and the aggrieved party bears the burden of defeating this assumption, . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.' *Id.* at 87, 117 S.Ct. at 1029 (citations omitted); quoting *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, (1981).

The Oultons' Petition to this Court contains no attempt to explain this deficiency despite their obligation to overcome "this assumption."

As noted above, the Oultons eventually raised a First Amendment claim in their Petition for Rehearing to the Supreme Court of Virginia and they now address the issue of restrictive covenant ambiguity – hardly a federal question – for the first time on appeal to this Court. This presents a situation similar to the procedural history of *Adams*, *supra,* where this Court noted "we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89, 117 S.Ct. at 1028 n.3. This Court's reasoning in refusing the appeal in *Adams* rested on the important consideration of comity, and it noted that "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," *Id.* at 90, 117 S.Ct. at 1031; *quoting Webb* at 500, 101 S.Ct. at 1893 (citations and internal quotation marks omitted). These considerations apply no less forcefully to the Oultons' Petition and call for the same result.

This Court has not held whether the rule requiring proper presentation of a federal question in the lower court is a jurisdictional or prudential one, *see, Yee* at 533, 112 S.Ct. at 1531-1532. Wyndham respectfully suggests that by either standard the Oultons' Petition should be denied for failure to present these claims, including that of an issue of federal law, in a proper manner.

II. The First Amendment does not apply to this case.

A. The Foundation is not a state actor.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state," *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 513, 96 S.Ct. 1029, 1033 (1976). The Foundation is an entirely private, incorporated homeowners' association, whose members make a voluntary choice to join when they purchase property in the Wyndham community. Wyndham contains approximately 1500 privately owned housing units and includes recreational facilities (such as a golf course and swimming pool, which are not open to the public). The Foundation exercises architectural control over the homes in Wyndham through the covenants and restrictions placed on the properties by its developer. All homeowners in Wyndham are on notice of these covenants and architectural control requirements before they purchase their homes and they voluntarily accept these rights and obligations along with ownership of land within the Association. Wyndham is a private community association and is in no way a state actor bound by the Constitution to protect free speech.

This Court carved out a narrow exception to the general rule that Constitutional rights are not guaranteed against private entities in the case of *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276 (1946). In *Marsh,* a privately-owned company town was found to provide all of the "public functions" of a municipality and thus could not curtail the First Amendment rights of a Jehovah's Witness handing out literature on a busy street corner. *Id.* at 501, 66 S.Ct. at 279. In subsequent decisions, the Court emphasized the narrow application of this "public function" exception to "the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town." *Hudgens* at 516, 96 S.Ct. at 1034; quoting *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 330-331, 88 S.Ct. 1601, 1615 (Black, J., dissenting) (1968).

In *Marsh,* the company-owned town had all of the outward appearances of a municipality, including residences, streets, shopping district, and sheriff's office owned and operated by the corporation. This unique situation is in no way analogous to the community in question in this case. Wyndham is a neighborhood development of individually owned residences and privately owned recreational facilities not open to the public. The Foundation does not operate roads, sewers, schools, waste treatment facilities, post offices, or any of the factors indicating "all the characteristics of any other American town." *Marsh* at 501, 66 S.Ct. at 277. These facts expose the incongruity of the Oultons' proposition that they somehow chose to withdraw from local government control in favor of homeowner association government. As the Fourth District Court of Appeals of Florida held in evaluating the

"public functions" of a homeowners association in a similar Constitutional analysis:

> [T]he services provided by a homeowners' association, unlike those provided in a company town, are merely a supplement to, rather than a replacement for, those provided by local government. As such, it cannot be said that the homeowners' association in this case acts in a sufficiently public manner so as to subject its activities to a state action analysis. *Brock v. Watergate Mobile Home Park Association, Inc.*, 502 So.2d 1380, 1382 (1987).

Another exception to the rule that Constitutional rights are not guaranteed against private entities may be found where "there is a sufficiently close nexus between the state and the challenged action" of a heavily regulated entity. *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 351, 95 S.Ct. 449, 453 (1974). The Oultons surprisingly cite *Jackson* for this proposition in their Petition, even though this Court found the heavily regulated utility with a governmentally protected monopoly in that case not to be a state actor for purposes of applying the Fourteenth Amendment. *See, id.* at 358-359, 95 S.Ct. at 457. As the Court held in that case, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . " *Id.* at 350, 95 S.Ct. at 453.

There is no nexus between Wyndham and the Commonwealth of Virginia which even remotely approaches qualifying the former as a state actor. Wyndham is incorporated under the auspices of the Virginia Non-Stock Corporation Act, 13.1 Va. Code Ann. §§ 801-980, and is subject to the Virginia Property Owners' Association Act,

55 Va. Code Ann. §§ 508-516. Its nexus with the state is no closer than any of the privately owned, incorporated businesses which are subject to state regulation, such as utilities, beauty salons, and car dealerships, none of which are state actors.

In summary, Wyndham does not meet the narrow criteria expounded in either the "public function" or "state involvement" tests in order to be classified as a private entity-state actor for Constitutional protection purposes. It is a private, incorporated association and its actions are not restricted by the Constitutional protections of the First Amendment.

B. A pole is not a protected symbol of expression.

"The Court for decades has recognized the communicative connotations of the use of flags," *Spence v. Washington,* 418 U.S. 405, 410, 94 S.Ct. 2727, 2730 (1974). Neither the Henrico County Circuit Court decree, the Virginia Supreme Court decision, nor the Wyndham covenant restriction at issue bar the display of flags.

As related above, Wyndham never told the Oultons that they could not display a flag on their property. In true point of fact, the Wyndham Design Guidelines provide for flags to be flown on house-mounted poles. (See Exhibit A to this Brief in Opposition.) Wyndham regulates no more than the installation of a structure on the Oultons' lot, pursuant to the authority granted to it by the Oultons when they purchased their property and accepted the covenants applicable to it. The decisions of the lower courts do no more than uphold this authority and grant no

further expansive power to the Association to outlaw or even regulate flags.

The Oultons suggest that they should be able to build any structure on their property, whether a pole or a pyramid, in complete contravention of the covenants and restrictions on their property, as long as the structure contains or displays a flag. The most tortured interpretation of the First Amendment could not support such an absurd result.

CONCLUSION

The Oultons appeal to this Court for reasons that are argued for the first time in their Petition for Writ of Certiorari. It is improper to ask a higher court to revisit and reverse a lower court's decision when the latter has not had the opportunity to address these same issues. The Petition should be denied for the reasons and authorities stated above.

Respectfully submitted,

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Exhibit A

The Wyndham Design Guidelines

Article X, Section 3(a)(10). No flag or flagpole of any size, shape, or form, temporary or permanent, shall be permitted on the exterior of any portion of a Unit or improvement thereon, except that the New Construction Committee or the Modifications Committee may grant written approval for a reasonable and aesthetic house mounted pole or poles which are attached to and extend from the façade of the house. One house mounted pole may be attached to and extend from the façade of a house without the prior written approval of the Modifications or New Construction Committee as long as the pole does not exceed 6 feet in length and the flag displayed on the pole does not exceed 4 feet x 6 feet.

Outside of this stated approved guideline, the display of any flag or the installation of any necessary supporting structure(s) for any flag on or within the Properties, including on the exterior of any Unit or any improvement thereon within Wyndham, is hereby expressly prohibited without the prior written approval of the New Construction Committee or the Modifications Committee. For the purposes of this Section, any flag or flagpole or necessary supporting structure for any flag on any portion of a Unit is deemed an 'exterior alteration or modification of existing improvements' as contemplated by Article XI of the Declaration of Covenants, Conditions and Restrictions for Wyndham."

Effective April 1, 2000.